No. 02-744

DEC 18 2002

IN THE

Supreme Court of the United States

MONICA LYNN COLEMAN

Petitioner,

v.

LORI S. SIMPSON, Trustee

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.
STATEMENT OF THE CASE

On May 7, 1999, Monica Lynn Coleman ("Petitioner" or "Ms. Coleman") filed a Voluntary Petition for relief under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Maryland (the "Bankruptcy Court"). On May 11, 1999, Coleman Craten, LLC ("Coleman Craten"), a company controlled by Ms. Coleman, filed a Voluntary Petition for relief under Chapter 11 of the Bankruptcy Code. On May 13, 1999, the Bankruptcy Court entered an Order converting Coleman Craten's bankruptcy case to a case under Chapter 7 of the Bankruptcy Code. Lori S. Simpson ("Trustee" or "Respondent") was appointed by the Office of the United States Trustee to serve as the Chapter 7 trustee in both the Coleman Craten and the Monica Lynn Coleman cases, which are jointly administered pursuant to an Order of the Bankruptcy Court.

The underlying adversary proceeding arises from the Petitioner's Complaint against the Trustee, filed on September 10, 1999, in which Petitioner alleged various tort claims. During the discovery phase of the case, the Trustee deposed Ms. Coleman. In response to each substantive question asked of her during the deposition, Ms. Coleman asserted the Fifth Amendment privilege against self-incrimination. As a result, on July 28, 2000, the Trustee filed a Motion for Summary Judgment and Memorandum of Law in support thereof (the "Trustee's Motion") requesting that the Bankruptcy Court issue an order granting summary judgment in favor of the Trustee. The Trustee's Motion was supported by affidavit and sworn testimony before the Bankruptcy Court. On July 31, 2000, Petitioner filed a

"Corrected Preliminary Dispositive Motion: Motion for Summary Judgment on the Pleadings," which was inadequately supported and merely restated the allegations contained in the initial pleadings. On November 20, 2000, the Bankruptcy Court entered a Memorandum Opinion and Order Granting Defendant's Motion for Summary Judgment and Denying Plaintiff's Motion for Summary Judgment.

On December 1, 2000, Petitioner filed her Notice of Appeal to the United States District Court for the District of Maryland (the "District Court"). Following the submission of briefs to the Honorable Marvin J. Garbis, and subsequent oral argument, Judge Garbis issued a Decision on Appeal and an Order Affirming Bankruptcy Court.

Ms. Coleman then filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit (the "Court of Appeals"). The parties submitted informal briefs. On March 27, 2002, the Court of Appeals affirmed the decision of the District Court in an unpublished *per curium* opinion. Further, the Court of Appeals denied: (1) Petitioner's request to submit a formal brief; (2) Petitioner's Motion to Stay Proceedings; and (3) Petitioner's Writ of Mandamus. On June 25, 2002, Ms. Coleman filed a Petition for Writ of Certiorari in this Honorable Court.

II.
STATEMENT OF THE FACTS

Due to the Petitioner's inclusion of facts not properly before the lower courts, and the misstatement of certain other facts, the Respondent states as supported by the facts below:

Lori S. Simpson, the Trustee, was duly appointed to serve as the Chapter 7 trustee in both of the above-referenced bankruptcy cases. Thereafter, pursuant to her duties under the United States Bankruptcy Code, the Trustee began investigating the assets, businesses, and other financial affairs of the Petitioner. The Trustee hired counsel and an asset manager to assist her with the administration of the Estate of Monica Lynn Coleman (the "Coleman Estate").

In furtherance of her administration of the Coleman Estate, the Trustee commenced her duties under the Bankruptcy Code and inspected, secured and collected assets of the Coleman Estate. These assets included two residences. Based upon the circumstances of her administration, the Trustee believed that the residences had been abandoned and the existence of conduct to conceal and deplete assets of the Coleman Estate was likely. Accordingly, the Trustee contacted the United States Office of the Trustee and alerted its attorneys to what she viewed as suspicious circumstances, including a possible plan to hide and conceal assets. That same day, James R. and Carol Hyde (together, "the Hydes"), creditors of the Coleman Estate and the Estate of Coleman Craten, LLC (collectively, the "Estates"), filed an emergency motion to convert the Coleman Craten bankruptcy case to Chapter 7. The United States Trustee filed a concurrence. The Trustee appeared as a witness so that she could inform the Bankruptcy Court of what she discovered during her administration, and to seek guidance from the Bankruptcy Court as to any appropriate action. Based on the testimony provided, the Bankruptcy Court converted the Coleman Craten case to Chapter 7 on May 13, 1999. Lori Simpson was subsequently appointed as the Trustee in the Coleman Craten case.

Notwithstanding that all of the Trustee's actions were taken in the course of performing her duties under the Bankruptcy Code, on or about September 10, 1999, Ms. Coleman initiated an adversary proceeding against the Trustee by filing a Complaint in the Bankruptcy Court alleging: (1) Breach of fiduciary duty resulting in gross negligence; (2) Fraud by negligent misrepresentation; (3) Misrepresentation; (4) Fraud by concealment or deceit; (5) Defamation; (6) Invasion of privacy by placing Plaintiff in false light; (7) Fraud by partial and fragmentary disclosure; (8) Perjury; (9) Negligence caused by breach of fiduciary duty of care to protect assets; (10) Misappropriation of assets/funds causing contractual breach; and (11) Gross negligence in bankruptcy administration.

As stated above, the Trustee deposed Ms. Coleman; however, she asserted the Fifth Amendment privilege to virtually all questions asked of her. As a result of the inability to obtain discovery information from Ms. Coleman, in conjunction with her deficient pleading, the Trustee submitted a Motion for Summary Judgment (the "Trustee's Motion"). Ms. Coleman submitted a cross-motion for summary judgment ("Ms. Coleman's Motion"). On or about November 20, 2000, the Trustee's Motion was granted and Ms. Coleman's Motion was denied. These decisions are the basis for Ms. Coleman's appeal to the District Court, Court of Appeals, and the filing of the instant Petition for Writ of Certiorari.

III.
REASONS FOR DENYING THE PETITION

A. Certiorari is Unwarranted Because Neither the Record nor the Decision Below Raise Certain Issues Presented by Petitioner.

The case below presented a basic question on the appeals: Whether the Bankruptcy Court erred in granting summary judgment in favor of the Trustee based upon, in part, immunity granted to her for actions taken in administering the Estates. The District Court and Court of Appeals answered this question in the negative.

Certain of the questions presented by the Petitioner, however, stray from the issues reviewed below. For instance, the Petitioner now seeks review of questions relating to the constitutionality of the Trustee's conduct and the ability of a trustee to collect and administer assets given the constraints of the Fourth Amendment to the Constitution. Moreover, the Petitioner seemingly seeks review of the lower courts' findings relating to the assertion of the Fifth Amendment privilege. Lastly, in a one paragraph unsupported recital, Ms. Coleman calls into question the abilities of the lower courts in applying law to the facts of this case. As explained below, however, none of these issues were presented to the Court of Appeals for consideration.

1. The Bankruptcy Proceeding

In the Bankruptcy Court, Petitioner argued that "[t]he basis of this case is that the Trustee acted outside of the scope of her authority . . . ." (Petitioner's Preliminary Answer to

Trustee's Request for Summary Judgment, at 2.) At no point in the bankruptcy pleadings did Ms. Coleman assert that the Trustee had violated her Fourth Amendment rights or performed an illegal search and seizure.

In granting summary judgment, the Bankruptcy Court concluded that the Trustee had presented sufficient evidence that she had carried out her actions in the course of performing her duties under the Bankruptcy Code. Ms. Coleman's claims of Breach of Fiduciary Duty Resulting in Gross Negligence, Negligence Caused by Breach of Fiduciary Duty of Care to Protect Assets, and Gross Negligence in Bankruptcy Administration were, therefore, invalid.

The Bankruptcy Court was similarly able to grant judgment in favor of the Trustee on counts alleging misrepresentation based on Ms. Coleman's failure to present sufficient evidence to support those claims. In reviewing these claims, the Bankruptcy Court addressed the Petitioner's assertion of the Fifth Amendment, noting that a party may not simultaneously use the Fifth Amendment privilege as a shield from questions that might incriminate her and as a sword to overcome the significant burden on a summary judgment motion.

In addressing Ms. Coleman's Defamation and Invasion of Privacy claims, the Bankruptcy Court examined the absolute privilege afforded to persons making statements during the course of judicial proceedings over which the court has jurisdiction. Because the allegedly defamatory statements were made by the Trustee before the Bankruptcy Court, or in documents presented to the Bankruptcy Court, it concluded that the privilege applied and that summary

judgment was proper. With respect to Ms. Coleman's claims for perjury and misappropriation, the Bankruptcy Court recognized that no such claims exist under Maryland state law, and in any event, were unsubstantiated.

2. The Appeal to the District Court

On appeal to the District Court, Petitioner asserted that the Bankruptcy Court improperly granted summary judgment in favor of the Trustee. First, Ms. Coleman argued that the Trustee acted outside of the scope of her duties and challenged whether the Trustee had met her burden in seeking summary judgment. Next, Ms. Coleman asserted that the Bankruptcy Court committed reversible error by raising issues *sua sponte*. Further, Ms. Coleman asserted that the Bankruptcy Court improperly excluded her evidence from consideration. Lastly, Ms. Coleman challenged the Bankruptcy Court's analysis of her Fifth Amendment privilege. At no point in her brief did the Petitioner assert that the Trustee's actions constituted an improper search and seizure or a violation of the Fourth Amendment to the United States Constitution.

In affirming the Bankruptcy Court, the District Court agreed with the Bankruptcy Court that the claims by the Petitioner were couched as claims against the Trustee personally and not in her official capacity and thus, summary judgment was appropriate as the only evidence presented established that the actions complained of were carried out within the scope of her duties as a trustee.

The District Court also briefly addressed Ms. Coleman's contention that the Bankruptcy Court punished her for exercising her Fifth Amendment privilege against self

incrimination. It concluded that based upon well-established law, while "a Plaintiff can assert her Fifth Amendment privilege, she still must rebut a motion for summary judgment by presenting admissible evidence sufficient to establish genuine issues of material fact." The judgment of the Bankruptcy Court was thus affirmed.

3. The Appeal to the Court of Appeals

On appeal to the Court of Appeals, the Petitioner presented an unsubstantiated allegation that the District Court did not have the record of the case at the time of its decision. Additionally, Petitioner claimed that the Bankruptcy Court raised issues *sua sponte* and failed to provide her with an opportunity to cure a defect in her pleading. Lastly, Petitioner challenges the interpretation of case law and its application to the facts of the instant case. Again, Petitioner did not reference any alleged violation of the Fourth Amendment or illegal searches and seizures. Finding no reversible error, the Court of Appeals affirmed based upon the reasoning of the District Court.

It is well settled that, generally, issues may not be raised for the first time on review to the United States Supreme Court. *See Kosak v. United States*, 465 U.S. 848, 850 n.3, 104 S. Ct. 1519, 1522 n.3, 79 L. Ed. 2d 860, 865 n.3 (1984) (concluding, "Because petitioner did not present this argument to the Court of Appeals, we decline to consider it."); *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n.6, 103 S. Ct. 2209, 2212 n.6, 76 L. Ed. 2d 387, 392 n.6 (1983) (declining to address an issue that had not been raised in the district court or the court of appeals); *United States v. Lovasco*, 431 U.S. 783, 788 n.7, 97 S. Ct. 2044, 2048 n.7, 52 L. Ed. 2d 752, 758 n.7 (1977) (explaining that absent exceptional

circumstances, the Court will decline to review issues not raised in the district court or court of appeals). Three factors are utilized in determining whether a new issue should be reviewed. *See Standard Indus., Inc. v. Tigrett Indus., Inc.*, 397 U.S. 586, 587, 90 S. Ct. 1310, 1311, 25 L. Ed. 2d 590, 591 (1970) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461, 1466 (1938)). The inquiry focuses on whether there has been a significant change in the law since trial, whether the assertion below would have been futile, and whether an important public interest is served by reviewing the issue. *See id.* Petitioner does not allege a change in the law to warrant review of newly-raised issues. Moreover, the assertion of Constitutional arguments below would have yielded the same result and there is no overwhelming public interest served by a review of the newly-presented issues in this case. Review by this Court of the newly-presented questions is, therefore, not warranted.

B. Assuming Petitioner's Issues are Properly Presented, Certiorari is Unwarranted Because Petitioner's Questions Do Not Rise to a Level of Substantiality for This Court's Review

The Petition represents a transparent attempt to present unique and different theories on which the Petitioner may gain yet another review of her claims. The Petitioner's existing and newly-asserted claims, however, are meritless. The Petitioner's questions do not rise to the level of substantiality for this Court's review as set forth in Supreme Court Rule 10. For instance, the law with respect to the asserted issues is: (1) not in conflict among courts of appeals; (2) does not present an important federal question that conflicts with a state court of last resort, and (3) does not represent a departure from accepted and usual course of judicial proceedings. Moreover, the issues do not have far

reaching impact to warrant the granting of a writ of certiorari. Accordingly, further review is unwarranted.

1. Petitioner's Perceived Conflict of Law Relating to a Bankruptcy Trustee's "Search and Seizure" and the Impact on Constitutional Rights Does Not Exist

Petitioner claims that her Petition should be granted because various decisions, including one from this Court, two from state courts, one from a court of appeals, one from a district court, and one from a bankruptcy court, relating to her newly-created constitutional search and seizure issues are in conflict with each other. Specifically, Ms. Coleman contends that *Kane v. Smith*, 355 P.2d 827 (Wash. 1960), *United States v. Masterson*, 383 F.2d 610 (2d Cir. 1967), *Bivens v. Six Unknown Agents*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), and *In re Barman*, 252 B.R. 403 (Bankr. E.D. Mich. 2000) impact the determination of whether a bankruptcy trustee may conduct a "search and seizure" without a court order and whether a trustee may waive Constitutional rights and privileges of a debtor. *See* Pet. at 15-24.

With respect to whether a bankruptcy trustee may waive a Constitutional right and privilege of a debtor, Ms. Coleman cites only *United States v. Patrick*, 916 F. Supp. 567, 571-72 (N.D.W.V. 1996) and *In re Application of Trustee in Bankr. For Search Warrant*, 173 B.R. 341 (N.D. Ohio 1994). The cases cited by Petitioner in support of her constitutional contentions do not represent a conflict of law, let alone a conflict among courts of appeals or between the

Court of Appeals and a state court of last resort pursuant to SUP. CT. R. 10.[1]

In support of her Petition, Ms. Coleman clearly misconstrues these cases as being relevant to the instant case and disingenuously attempts to create a conflict among the cited cases. For instance, Petitioner describes *Kane* as a case requiring a trustee to utilize turnover procedures to administer assets of a debtor. *See* Pet. at 17. The Supreme Court of Washington, however, analyzed whether a turnover order obtained by a trustee can be enforced in state courts following an order dismissing the bankruptcy. *See Kane*, 355 P.2d at 831. It did not address the myriad of ways or in any way limit the methods by which trustee can fulfill her duties of collecting and administering property of a debtor's estate.

With respect to *Masterson*, the two issues presented were whether there was sufficient evidence to convict a defendant of a crime and whether certain evidence should have been suppressed from a criminal trial. *See Masterson*, 383 F.2d at 611. The Court of Appeals for the Second Circuit refused to address the suppression issue as the appellant failed to adequately establish standing to challenge the alleged search and seizure. *See id.* at 613. Petitioner attempts to distort the ruling in an effort to create an inconsistency with *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971). In *Bivens*, however, this Court did not address the issues presented in *Masterson*. Nor did this Court evaluate a trustee's liability for collecting assets of a debtor who had filed a voluntary petition and consented to the

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[1] Even if a conflict existed among the cases cited by Ms. Coleman, a conflict among the jurisdictions deciding such cases would not rise to the level of substantiality for review by this Court. *See* SUP. CT. R. 10.

turnover of her assets, as is the case here. *Bivens* also failed to address the immunity for public officials. Indeed, the *Bivens* Court expressly declined to address such argument. *See id.* at 397-398 (explaining that the immunity issue was not addressed by the court of appeals). There is no rationale relationship between the criminal suppression case and the civil liability case. There is no issue presented here that rises to the necessary level for review by this Court.

Petitioner cites *In re Barman*, 252 B.R. 403, 404 (Bankr. E.D. Mich. 2000) as her last authority on the "search and seizure" issue and provides a lengthy interpretation of the holding. She concludes that if the Bankruptcy Court in Maryland applied the law promulgated by the Eastern District of Michigan then "the respondent could not have prevailed." This argument is not a proper basis for review by this Court.

Even if the *Barman* decision somehow was controlling on the Bankruptcy Court below, the *Barman* Court holds that although a debtor has a diminished expectation of privacy due to the bankruptcy filing, a debtor maintains some reasonable expectation of privacy in his or her residence. *See Barman*, 252 B.R. at 415. It is important to note that the Court recognized that in certain instances, a debtor cannot "expect to be free from intrusions by the trustee, who is entitled to possession of the bankrupt's property." *Id.* at n.10 (citing *Wade v. Smith*, 1991 U.S. Dist. Lexis 21787, 1991 WL 504873, at *6 (S.D. Ind. 1991)); *Masterson*, 383 F.2d at 613. This reference implies that the determination is factual in nature. In the instant case, however, there has never been a factual determination of these issues. This forum is not a proper place for an initial determination of facts. Further, the case is inapposite

because it did not analyze the potential liability and defenses, including immunity, for a trustee's conduct.

With respect to the argument relating to whether a bankruptcy trustee may waive a Constitutional right of a debtor, namely the Fourth Amendment right prohibiting illegal search and seizures, Ms. Coleman cites *Patrick*, which allowed a trustee to consent to a search of a corporate debtor's property, *see Patrick*, 916 F. Supp. at 571-72, and *In re Application of Trustee*, which held that a bankruptcy trustee was not a law enforcement officer or an attorney for the government and, thus, was not authorized to have a search warrant issued. *See In re Application of Trustee*, 173 B.R. at 342. Neither of these cases relate to the Petitioner's question presented which is reworded for clarity by the Respondent as follows: Whether a bankruptcy trustee can waive an *individual* debtor's Constitutional rights. Petitioner has overlooked the distinction.

In sum, by contrasting the highly distinguishable cases cited in the Petition, Ms. Coleman improperly creates the impression that confusion and substantial conflict exists among the courts with respect to a trustee's conduct. This simply is not the case. Moreover, Ms. Coleman's citation to cases of different jurisdictions and her failure to present court of appeal cases that are in conflict "on the same important matter," should be fatal. Additionally, Ms. Coleman's review of the underlying facts coupled with her misplaced analyses are improper at this stage of judicial review. By any analysis, this case raises no significant issue of law that warrants this Court's review.

2. Petitioner's Request for Clarity on Her Interpretation of Case Law Does Not Present a Far-Reaching Principle Warranting Consideration.

The Petitioner essentially asks this Court to provide clarification on its rulings in two cases: *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 105 S. Ct. 1986, 85 L. Ed. 2d 372 (1985) and *Mosser v. Darrow*, 341 U.S. 267, 71 S. Ct. 680, 95 L. Ed. 927 (1951). Specifically, Ms. Coleman petitions for a writ of certiorari to ask this Court to explain the limits on the "wide discretion" *dicta* in *Weintraub*, to clarify whether lower courts may rely upon *Weintraub* to provide immunity to trustees, and to confirm whether a bankruptcy trustee is entitled to define his or her "scope of duty." Pet. at 25.

The Petitioner seemingly interprets the two cases to illustrate conflicting standards for imposing liability for bankruptcy trustees. *See* Pet. at 25. These rulings, however, do not conflict. Indeed, Petitioners have failed to establish any relationship between the holdings of the cases, other than to tenuously assert that both *Weintraub* and *Mosser* address issues related to bankruptcy trustees.

In *Mosser,* this Court addressed whether a trustee, who knowingly permitted his employees to profit from trading in securities of the debtors' subsidiaries, could be held personally liable even though the trustee did not personally profit from his employees' transgressions. *See Mosser*, 341 U.S. at 268, 71 S. Ct. at 681, 95 L. Ed. at 930. Reversing the decision of the appellate court, which applied principles of negligence, this Court concluded that an evaluation of negligence principles was misplaced because the conduct clearly rose to the level of willful and deliberate.

See id. at 272, 71 S. Ct. at 682, 95 L. Ed. at 932. The Court held that the trustee was liable for the actions committed by his employees because he "knowingly authorized" the conduct causing harm. In recognizing the knowledge of the trustee, the Court did not need to evaluate whether the trustee would have been liable for negligent conduct. *See id.*

In a wholly unrelated opinion, the *Weintraub* Court concluded that a bankruptcy trustee had the power to waive the attorney-client privilege of a corporate debtor.[2] *See Weintraub*, 471 U.S. at 354. Petitioner, however, cites this case as promulgating a "wide discretion" rule for evaluating the conduct of a trustee. This interpretation is wholly unsound. Moreover, Petitioner contends that "this ruling opened a Pandora's box leading to inconsistent rulings amongst the jurisdictions regarding what a trustee is allowed to do," *see* Pet. at 26; however, she fails to cite a single case that would represent an inconsistent decision.

In short, Petitioner fails to present an inconsistent or unclear position reflected in either *Mosser* or *Weintraub*. Although both cases address issues relating to a trustee's roles, they hardly stand in contrast to each other. Contrary to Petitioner's assertions, the United States courts are not in a state of confusion in their attempts to reconcile the decisions. Petitioner has failed to present a significant issue that has far-reaching implications and, for the reasons stated above, the Respondent requests that the Court deny Petitioners request for a writ of certiorari.

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[2] The Court specifically stated that it was not addressing whether the holding applies to an individual in bankruptcy, as is the case here. *See Weintraub*, 471 U.S. at 356.

3. The Limits Placed on a Civil Litigant's Right to Invoke the Fifth Amendment Privilege Against Self-Incrimination in a Self-Serving Manner Are Well Settled.

In granting summary judgment in favor of the Trustee, the Bankruptcy Court noted that Ms. Coleman was required to present evidence to establish the existence of material facts in order to survive a motion for summary judgment. Because she had failed to present such evidence, regardless of her rationale for so declining, the Bankruptcy Court ruled in favor of the Trustee. Relying on well-settled case law, the Bankruptcy Court ultimately concluded as follows:

> Although Ms. Coleman's Fifth Amendment privilege may shield her from answering questions that tend to incriminate her, one consequence that follows from her refusal to answer questions or to provide a proper affidavit is that she is unable to thwart the trustee's motion for summary judgment. The Court of Appeals for the Fourth Circuit has noted the difficult choice presented to a civil plaintiff such as Ms. Coleman who invokes her Fifth Amendment privilege:
>
> > In many civil cases the burden placed on a person's silence may be unavoidable. Where a plaintiff has gathered sufficient evidence to establish a claim prior to discovery, a defendant who risks incrimination by speaking will inevitably face the choice of forsaking silence of losing

> a civil judgment, even if the defendant's silence is not used against him. *A plaintiff whose claim requires incriminating testimony will likewise always face the choice of speaking or forsaking his prayer for redress.*
>
> *In re Grand Jury Subpoena*, 836 F.2d 1468, 1472 n.4 (4th Cir. 1988) (emphasis supplied).

Bankruptcy Court Opinion (Pet. App. 3 at 51).

The decision rendered in *In re Grand Jury Subpoena* represents the general consensus of the courts of appeals on the issue of a civil litigant's right to invoke the Fifth Amendment. *See, e.g., United States v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir. 1990) (affirming grant of summary judgment when defendant invoked Fifth Amendment privilege); *United States v. 4003-4005 5th Ave.*, 55 F.3d 78, 85 (2nd Cir. 1995); *In re Edmond*, 934 F.2d 1304, 1308 (4th Cir. 1991) (holding that a district court is justified in striking an affidavit when a party has selectively asserted "his Fifth Amendment privilege . . . as a shield to oppose depositions while discarding it for the limited purpose of making statements to support a summary judgment motion."); *Wehling v. Columbia Broadcasting Sys.*, 608 F.2d 1084, 1087 (5th Cir. 1979) (cautioning that the trial court should guard against allowing the parties to use the Fifth Amendment shield as a sword); *Kisting v. Westchester Fire Ins. Co.*, 416 F.2d 967 (7th Cir. 1969); *Lyons v. Johnson*, 415 F.2d 540 (9th Cir. 1969) (dismissing plaintiff's claims as a result of her blocking the defendant's discovery by asserting the Fifth Amendment privilege).

Based on this well-settled tenet of law, the Bankruptcy Court correctly prevented Ms. Coleman from using the privilege as both an offensive and defensive tactic. Because the ruling of the Bankruptcy Court, which was affirmed by the District Court and Court of Appeals, does not conflict with other rulings addressing the issue, review by this Court is unwarranted.

Petitioner also argues on this matter that the Bankruptcy Court was required to inform her that her continued assertion of the Fifth Amendment privilege would lead to a dismissal or judgment against her. Ms. Coleman cites *Wood v. Allstate Ins. Co.*, 21 F.3d 741, 745 (7th Cir. 1994) for the proposition that "[n]on-cooperation must be material." Again, her citation to specific authority is misplaced. In *Wood*, the Court examined whether an insured complied with the insurance policy contractual obligations requiring cooperation with the insurer. *See id.* at 745. The case did not pertain to the assertion of a Fifth Amendment privilege. Ms. Coleman also states in passing that, presumably the Bankruptcy Court, raised issues *sua sponte*. Petitioner does not state what issues were raised by the Bankruptcy Court on its own, but cites to *dicta* in *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) for the proposition that a court must provide a litigant the opportunity to cure the defect. *See* Pet. at 29. The *Celotex* decision explains that a court, without being moved by a party, may only grant summary judgment upon notice to the party. *See id.* at 326, 106 S. Ct. at 2554, 91 L. Ed. 2d at 275-76. The instant case is distinguishable in that there were two motions for summary judgment pending. There was no *sua sponte* decision by the Bankruptcy Court to extinguish Petitioner's claims. With this question, Petitioner fails to present an issue that warrants a granting of her Petition.

4. Petitioner Does Not Present an Issue of Law in Her Question Asking Whether the Lower Courts Need Direction in Applying Law.

In her last effort to grasp the attention of this Court, Petitioner recites one paragraph calling into question the abilities of the lower courts. Ms. Coleman states that she "was denied the due process afforded under the U.S. Constitution as the judiciary system did not apply applicable law in making their determinations, nor did they explain why they deviated from established law." Pet. at 29. Petitioner does not indicate what "applicable law" was not applied. Nor does Ms. Coleman indicate what controlling law was deviated from by the courts below in their rationales. In its simplest form, this question presented by the Petitioner states the basis for her prior appeals and the submission of her petition for writ of certiorari. As there is no legal issue presented, the Respondent simply highlights the lack of support and authority for Petitioner's position.

IV.
CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

DATED: December 14, 2002

Respectfully submitted,

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